Gannett Rochester Newspapers, a Division of Gannett Co., Inc. *and* The Newspaper Guild of Rochester, Local 17. Case 3–CA–15531

December 23, 1991

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On June 12, 1991, Administrative Law Judge D. Barry Morris issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.[1]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Gannett Rochester Newspapers, a division of Gannett Co., Inc., Rochester, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER OVIATT, concurring.

I am concerned about the effect the rule that a waiver of statutory right must be clear and unmistakable has on the practical ability of parties to reach agreement on a new contract and the relationship that emanates therefrom.

In practice when parties who have previously bargained contracts sit down to bargain a new contract they usually start with the language of the expiring contract. Unless there are proposed language changes, the old contract's language becomes the basis at least for the noneconomic terms of the new contract. The parties do not go through each provision of the old contract that they are adopting without change and discuss whether by that language the Union is waiving a right to request something not specifically included in the particular clause. For they recognize that to do so would likely bog down the bargainers in a discussion of past matters that in turn could lead to disagreements and to difficulties in selling the contract to their respective constituencies. Thus, to require the bargainers specifically to agree to what is or is not included in a particular contract provision that has been carried forward from old contracts in my view creates a situation that could be more destructive of a positive collective-bargaining relationship than helpful to it. And to refuse to give effect to a zipper clause unless the parties have engaged in close analysis and extensive discussion of the scope of each clause carried forward in essentially the same form from previous contracts renders negotiation of the zipper clause a meaningless exercise.[1] It is not surprising, therefore, that in this case, with experienced bargainers at the table, there is no contemporaneous interpretation from the bargainers concerning the meaning of the zipper clause as it is related to information not specifically listed in article III A.

I am nonetheless constrained to concur here in view of the Supreme Court's statement in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983), that:

> [W]e will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is explicitly stated.

[1] The judge found, and we agree, that the Respondent unlawfully refused to provide the Union with certain relevant information requested by the Union. The Union's request for the disputed information was the first such request under the current contract. The disputed information, however, had been previously provided under prior contracts pursuant to the Union's requests. In excepting to the judge's decision, the Respondent points out that the current contract specifies that certain information will be provided to the Union but does not provide that the disputed information must be supplied. The Respondent further notes that the current contract contains a zipper clause and contends that this zipper clause, combined with the provision specifying what information shall be provided, precludes the Union from relying on past practice to justify its request for the disputed information. In support of its position, the Respondent relies on *TCI of New York*, 301 NLRB 822 (1991), where the Board held that a union had waived its right to bargain over the discontinuance of a benefit.

We find this case distinguishable from *TCI* despite the similarity in the language of the zipper clauses in the two cases. In *TCI*, supra, the language of the zipper clause had been negotiated and changed during bargaining for the most recent contract. Here, the Respondent had provided the information now in dispute in response to the Union's information requests under the prior contract. The language of the zipper clause and the relevant language of the information clause were not changed from that in the preceding contract to the current contract. Therefore, here, unlike the situation in *TCI*, no event put the Union on notice that the Respondent contemplated a change in the bargaining relationship in that respect. See *Pepsi-Cola Distributing Co.*, 241 NLRB 869 (1979), enfd. 646 F.2d 1173 (6th Cir. 1981); *Aeronca, Inc.*, 253 NLRB 261 (1980), enf. denied 650 F.2d 501 (4th Cir. 1981). Accordingly, we agree with the judge that the Union did not clearly and unmistakably waive its right to request the disputed information.

[1] If during bargaining the Respondent's negotiator had made an oral commitment to supply the requested information, in my opinion that would have bound the Respondent, notwithstanding the absence of any specific identification of that information in art. III A, and even with the zipper clause in the contract. Commitments of that sort should be given overriding effect. While there is record evidence that such a commitment may have been given, the judge made no factfindings on this point. In any event, I do not reach the question because, as discussed below, under the rule applied by the Supreme Court I must conclude that there has been no waiver.

In this case, while there are contractual provisions that strongly suggest the parties understood that the Union would not be entitled to the information it requested, and that the Respondent's furnishing of this information in the past was entirely gratuitous, I cannot find that there was an ''explicit'' waiver of the Union's statutory right to the requested information. Accordingly, I reluctantly concur in the opinion of the panel majority in this case.

Michael Cooperman, Esq., for the General Counsel.
William A. Behan, Esq., of Arlington, Virginia, for the Respondent.
Matthew J. Fusco, Esq. (Chamberlain, D'Amanda, Oppenheimer & Greenfield), of Rochester, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in Rochester, New York, on August 13 and 14, 1990.[1] Upon a charge filed on March 26, a complaint was issued on May 10, alleging that Gannett Rochester Newspapers, a Division of Gannett Co., Inc. (Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). Respondent filed an answer denying the commission of the alleged unfair labor practices.

The parties were given full opportunity to participate, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were filed by all of the parties.

On the entire record of the case, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Delaware corporation, with an office and place of business in Rochester, New York, has been engaged in the publication of the Democrat and Chronicle and the Times Union, daily newspapers in the Rochester, New York area. During the 12 months prior to the issuance of the complaint, Respondent derived gross revenues in excess of $200,000, held membership in, or subscribed to, various interstate news services, published various nationally syndicated features and advertised various nationally sold products. Respondent admits, and I so find, that it is an employer engaged in commerce, within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it has been admitted and I so find, that the Newspaper Guild of Rochester, Local 17 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The Union and Respondent have been parties to a series of collective-bargaining agreements, the last of which is effective September 25, 1989, to September 24, 1992. Article III, A of the present agreement provides:

> The Publisher shall supply the President of the Guild, upon written request, with a list containing the following information for all regular full-time Guild bargaining unit employees on the payroll . . . (1) name, (2) address, (3) experience rating, (4) anniversary date, (5) date of hire [and] (6) salary.

Article III, A has been contained in collective-bargaining agreements between the parties since the contract signed by the parties in 1979. The language in article III, A has been substantially the same in each contract negotiated since that date.

Prior to 1990, the Union had requested wage information beyond that specifically set forth in article III, A and Respondent had been furnishing the Union with such information. In addition to the information specifically covered by article III, A, Respondent provided the Union with information regarding grade, evaluation rating, previous salary, work history raises, merit raises, and step raises of unit employees.

In a letter dated January 2 the Union made its semi-annual request for wage information covering the last half of 1989. However, the information supplied by Respondent in response to this request was restricted to the data specifically listed in article III, A. On February 12 the Union wrote to Respondent, as follows:

> The salary information for the second half of 1989, forwarded the Guild with a note dated January 31, does not contain all the necessary information. Missing are grade, evaluation rating, previous salary, work history raises, merit raises and step raises.
>
> As you know, we have received this information in response to all previous requests. The missing information is needed for the Guild to properly administer the contract.

On March 16 Respondent replied to the Union, as follows:

> Because this is the Guild's first request for information since the signing of the current contract, the Publisher will adhere to the language in article III A. Furthermore, in accordance with Article XXV, section 4, the Publisher recognizes that the current contract ''constitutes the sole and entire agreement between the parties, and supercedes all prior agreements, commitments, and practices, whether oral or written between the Company and the Union, or the Company and any covered employee or employees.''

Article XXV, section 4, known as the zipper clause, which has been in the prior agreements[2] as well, states:

> The contract entered into on September 25, 1989 between the Newspaper Guild of Rochester and the Rochester Democrat and Chronicle and Rochester Times-Union constitutes the sole and entire agreement between the parties, and supersedes all prior agreements, commitments, and practices, whether oral or written be-

[1] All dates refer to 1990 unless otherwise specified.

[2] The clause appeared in the prior agreements as art. XV, sec. 4.

> tween the Company and the Union, or the Company and any covered employee or employees.

Prior to 1990 Respondent has not used this clause in response to the Union's semi-annual wage information requests. Since the letter of March 16 Respondent has failed to supply the additional wage information requested by the Union in its February 12 letter.

B. *Discussion and Conclusions*

Respondent does not contend that the additional information requested by the Union is not relevant. Instead, Respondent argues that the Union waived its right to the additional information because it agreed to the language in article III, A after collective bargaining. In addition, Respondent contends that the zipper clause contained in article XXV, section 4, eliminates past practices from consideration.

The duty to furnish information is a statutory obligation which exists independent of any agreement between the parties. *American Standard*, 203 NLRB 1132 (1973). Although a union may relinquish a statutory right, any waiver of such a right, however, must be clear and unmistakable. As the Board stated in *Bozzuto's, Inc.*, 275 NLRB 353 (1985):

> The Respondent does not deny the the relevance of the requested addresses, but instead argues that the following contractual provision limited the information to which the Union is entitled and thus waived the Union's right to the addresses. . . . We do not agree. The provision specifies what information to include in a seniority list. The clause does not provide that other information need not be disclosed to the Union and the Respondent points to no other contractual provision that addresses the Union's right to receive information. We find that the contract does not clearly and unmistakably waive the Union's right to a list of unit members' addresses.

Article III, A provides that the name, address, experience rating, anniversary date, date of hire and salary of unit employees shall be furnished. It does not provide that *only* that information shall be furnished. The clause was unchanged from the prior collective-bargaining agreement. In addition, the record indicates that there was no discussion during the negotiations of the information to be furnished. Inasmuch as there was no discussion and no change in the language of the clause, I believe that the Union had every reason to expect that it would continue to receive the same information that it had received for the prior 10 years pursuant to its request for information.

Respondent contends that because of the zipper clause it is not required to provide the additional information. However, a zipper clause which is carried over from a prior collective-bargaining agreement, where there has been no modification from the prior contract, cannot be used to eliminate a past practice and thereby establish a clear and unmistakable waiver. In *Angelus Block Co.*, 250 NLRB 868, 877 (1980), it was stated:

> A zipper clause must meet the standard of any other form of alleged waiver. It is well established that in order to establish waiver of the statutory right to bargain in regard to mandatory subjects of bargaining . . . there must be a clear and unequivocal relinquishment of such right. Even where a zipper clause is couched in broad terms, it must appear from an evaluation of the negotiations that the particular matter in issue was fully discussed or consciously explored and the Union consciously yielded or clearly and unmistakably waived its interest in the matter.

See also *Suffolk Child Development Center*, 277 NLRB 1345 (1985).

In addition, as the Board recently stated in *Johnson-Bateman Co.*, 295 NLRB 180, 185 (1989):

> Waiver of a statutory right may be evidenced by bargaining history, but the Board requires the matter at issue to have been fully discussed and consciously explored during negotiations and the union to have consciously yielded or clearly or unmistakably waived its interest in the matter. [*Rockwell International Corp.*, 260 NLRB 1346, 1347 (1982).]

Both article III, A and the zipper clause in the current contract are substantially the same as they were in the prior contract. The record is clear that there was no discussion during the negotiations concerning the list of items in article III, A. In addition, other than a discussion during negotiations concerning whether a separate zipper clause for mergers was necessary, there was no discussion of article XXV, section 4 during the negotiations. Under *Johnson-Bateman*, supra, inasmuch as the additional information was not discussed during the negotiations the Union clearly did not ''consciously yield'' or ''clearly or unmistakably waive its interest in the matter.''

Respondent relies on *Hearst Corp.*, 113 NLRB 1067 (1955), where the Board held that the Union waived its statutory right to additional information. The *Hearst* case, however, is distinguishable. As the Board pointed out in *Hearst* (id. at 1070–1071): ''What the Union asked for on September 9 was almost precisely the portion of its May 27 information proposal that the Respondent had refused to assent to, and which the Union had, in fact, abandoned, in the course of the bargaining negotiations . . . .'' In *Hearst*, during negotiations, the union proposed, and then abandoned, the same information it later requested. Under such circumstances the Board held that the union had clearly waived its right to the additional information. In the instant proceeding, however, the additional information was never brought to the table for negotiations. There was no discussion of article III, A during negotiations nor, except for a discussion whether to have a separate zipper clause for mergers, was there any discussion of changing article XXV, section 4.

I conclude that there has been no clear and unmistakable waiver by the Union to furnishing the additional information. The Union had every reason to believe that the longstanding past practice of providing the additional information would continue. The zipper clause, which was carried over from the prior contract, without modification, cannot be used to eliminate the past practice of providing the additional information.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing to furnish the Union with information concerning grade, evaluation rating, previous salary, work history raises, merit raises, and step raises of unit employees, Respondent has violated Section 8(a)(1) and (5) of the Act.

4. The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I find it necessary to order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Gannett Rochester Newspapers, a Division of Gannett Co., Inc., Rochester, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the Newspaper Guild of Rochester, Local 17 by refusing to furnish information to the Union regarding grade, evaluation rating, previous salary, work history raises, merit raises, and step raises of employees in the following appropriate unit:

> All full-time employees of the news and editorial departments as described in the collective-bargaining agreement between the parties employed by Respondent at its 55 Exchange Boulevard, Rochester, New York facility, excluding all individuals described as exempt in Article 1 of the collective-bargaining agreement, all managerial employees, confidential employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, furnish the Union with information concerning grade, evaluation rating, previous salary, work history raises, merit raises, and step raises of unit employees.

(b) Post at its facility in Rochester, New York, copies of the attached notice marked ''Appendix.''[4] Copies of the notice on forms provided by the Regional Director for Region 3, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and be maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with the Newspaper Guild of Rochester, Local 17 by refusing to furnish the Union with information concerning grade, evaluation rating, previous salary, work history raises, merit raises, and step raises of employees in the following unit:

> All full-time employees of the news and editorial departments as described in the collective-bargaining agreement between the parties employed by us at our 55 Exchange Boulevard, Rochester, New York facility, excluding all individuals described as exempt in Article 1 of the collective-bargaining agreement, all managerial employees, confidential employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL, on request, furnish the Union with information concerning grade, evaluation rating, previous salary, work history raises, merit raises, and step raises of unit employees.

GANNETT ROCHESTER NEWSPAPERS, A DIVISION OF GANNETT CO., INC.